

MINUTES  
BOARD OF ENVIRONMENTAL REVIEW  
FRIDAY – JUNE 7, 2002

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:10 a.m., on Friday, June 7, 2002, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Susan Kirby Brooke, David Fishbaugh, Garon Smith, Ward Shanahan, Kim Lacey (tardy), and Russ Hudson

Board Members Absent: None

Board Attorneys Present: Tom Bowe and Kelly O'Sullivan, Attorney Generals Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Carol Hendrickson, Hendrickson's Court Reporting

Department Personnel Present: Curt Chisholm, Deputy Director; John North, Chief Legal Council, Legal Unit, Director's Office (DIR); David Rusoff, Legal Council, Legal Unit, DIR; Keith Christie, Legal Unit, DIR; Steve Welch, Administrator, Permitting & Compliance Division (PCD); John Arrigo, Administrator, Enforcement Division (ED); Don Vidrine, Bureau Chief, Air and Waste Management (AWMB), PCD; Art Compton, Administrator, Planning, Prevention and Assistance Division (PPAD); Dave Klemp, Air Quality Permitting Program Manager, AWMB, PCD; Charles Homer, Technical Support Manager, AWMB, PCD; Jan Brown, AWMB, PCD; Lisa Peterson, Public Affairs Coordinator, DIR; Norm Mullen, Legal Council, Legal Unit, DIR; Dan Walsh, AWMB, PCD; Vickie Walsh, Air Compliance Program Manager, AWMB, PCD; Debbie Skibicki, AWMB, PCD; Bob Martin, AWMB, PCD; Deb Walker, AWMB, PCD; Karen Wilson, AWMB, PCD; Jolynn Eggart, Legal Unit, DIR; John Koerth, Mine Waste Cleanup, Remediation Division (REM); Judy Hanson, PCD

Interested Persons Present: M.W. Perga, Cenex; Dexter Busby, Montana Refining; Charles Hansberry, Holland & Hart; Rex Monsoris [sic], Tongue River Farm; Roger Muggli, Tongue & Yellowstone River Irrigation District (TYID); Mark Fix, Northern Plains Resource Council (NPRC); Charles Gephart, TYID; Raymond Muggli; Gene Onacko, Jr., BIA [sic]; Steve Gilbert, NPRC; Art Hayes, Jr., Tongue River Water Users (TRWU); Leona [sic] Ward Hanson [sic], Billings Citizen; Dave Simpson, Westmoreland Coal; Mary [sic] Vandenbosch [sic], Legislative Services Division; Russell Boschee, YCARC [sic]; Anne Hedges, MEIC; Julie DalSoglio, US EPA, MT Office; Alan Joscelyn; Terry Webster, Continental Energy; Don Allen, WETA; Gail Albercrombie [sic], Montana Petroleum Association; Carlton Grimm, PPL MT; Brenda Lindlief [sic] Hall, TRWU; Michael Armix [sic], Maxim Technologies; Mary Beth Marks, USDA Forest Service

Curt Chisholm, Department Deputy Director, recapped Chairman Russell's request to remind him to hold off on Briefing Agenda Item III.B, concerning the numeric standards rule, until Board member Kim Lacey was present.

I. Hearings and Action

A. Louisiana-Pacific Corporation's Appeal

Mr. Chisholm reiterated that the LP hearing, which had been scheduled for the previous day, had been cancelled and that the Department had tried to give the Board as much advance notice as possible.

II. Administrative Items

A. Review and Approve Minutes of March 29, 2002, Meeting.

Mr. Hudson identified that "counsel" was inaccurately spelled as "council" numerous times throughout the minutes.

Garon Smith MOVED to APPROVE the minutes with the corrections noted. Mr. Fishbaugh SECONDED the motion. The motion CARRIED unanimously.

III. Briefing Items

A. Contested Case Update

1. Cases Assigned to Hearing Officer Kelly O'Sullivan

a. Town of Geraldine

Kelly O'Sullivan, Board Attorney, provided an update on the Town of Geraldine, stating she had a status conference with the parties on May 24. She further stated the rules went out for a hearing, the comment period closed May 20, and the rules would be before the Board at its July meeting. Ms. O'Sullivan informed the Board the parties in Geraldine were waiting for the outcome of the rulemaking process before proceeding in the case. Ms. O'Sullivan stated she would schedule another status conference in September.

b. & c. Conoco, Inc. and Blaine County, respectively

Ms. O'Sullivan informed the Board that both cases have settled and that settlement agreements will be presented to the Board for approval at a later time in the Agenda.

2. Cases Assigned to Hearing Officer Tom Bowe

a. M&W Investments, Inc.

Tom Bowe, Board Attorney, informed the Board there are now three M & W Investments cases and that in this particular case the parties have agreed on a schedule. He further stated he believed more data would be collected during the summer and that a prehearing conference would be held late this year.

b. Sterling Mining Company

Mr. Bowe informed the Board the parties agreed to a further extension of their schedule and that he had issued an order on May 24 for a hearing on motions to take place August 6.

3. Cases in Litigation

a. United Harvest

Mr. Bowe updated the Board on this case, stating that the petitioners appealed from the judgement of the District Court. He further stated that this appeal has the potential to result in a decision clarifying the law regarding the relationship between air permit appeals and the Montana Environmental Policy Act (MEPA). He also acknowledged that the Board is not a party to this appeal.

**Regarding Agenda Item I.A,** Chairman Russell inquired whether Mr. Bowe would be talking about the LP case. He also questioned whether there would be discussion today on the settlement.

In response, Mr. Bowe stated the information he had was included in the order vacating the contested case hearing date. He further explained that there are some technical issues and that it will take some time to work out the details of a formal settlement.

Chuck Hansberry, attorney for LP, provided an update in the case, explaining there had been a few more recent developments. He stated LP had approved the engineering and the funds available to take the stacks into one stack, which would result in a single plume. Mr. Hansberry explained that this would require significant redrafting of the permit. He further stated they expect to have a stipulation and a proposed order to present at the next Board meeting.

**Regarding Agenda Item III.B,** Chairman Russell reiterated that the Board would wait to address this item until Ms. Lacey was present.

#### IV. Action Items

##### A. Initiation of Rulemaking and Amendments

##### 1. Air Quality Operation Fees, Annual Review of Air Quality Permit Fees, and Open Burning Fees

Chairman Russell introduced this agenda item. Mr. Chisholm introduced Charles Homer to provide testimony to the Board on this rulemaking.

Mr. Homer, representing Department, stated the Department is requesting consideration of revisions to ARM 17.8.505, 510, and 514 to amend the annual air quality operation fees and open burning fees, which are to be determined and reviewed annually by the Board.

Mr. Homer provided information for the basis of the air quality operation fees and spoke of the relationship between monies the Department generates through the air quality operation fees, the carryover at the end of fiscal years, and the legislative appropriations. He also provided some in-depth information regarding decreases in monies collected through those fees and the reasons for those decreases. Mr. Homer gave further testimony on the Department's request to increase fees for major open burning applications and again offered reasoning for the increase.

Mr. Homer offered testimony for eliminating the reference to the former tiered system of assessing different fees for different regulated pollutants in ARM 17.8.510. He stated that the Department was recommending that the Board initiate rulemaking, appoint a hearings officer, and conduct a hearing. Mr. Homer reminded the Board that a letter from Carlton Grimm of PPL Montana (PPL), requesting that the Board consider several alternative proposals, was included in their packet.

Mr. Hudson, Mr. Homer, and Chairman Russell engaged in a brief discussion regarding the fees and PPL's objections.

Mr. Shanahan MOVED to initiate the rulemaking and to appoint Mr. Bowe as the hearings officer. Ms. Brooke SECONDED the motion. The motion CARRIED unanimously.

B. Adoption, Modification, or Repeal of Final Rules

1. In the matter of the amendment of ARM 17.30.2003 pertaining to enforcement actions for administrative penalties for violations of water quality laws.

Mr. Bowe, as presiding officer, stated that the Department is recommending adoption of the proposed rules and modifications.

Mr. Shanahan MOVED to amend ARM 17.30.2003 and accept Mr. Bowe's comments as well as the Department's 311 and 521 analysis. Ms. Brooke SECONDED the motion. The motion CARRIED unanimously.

2. In the matter of the amendment of ARM 17.8.101, 102, 302, 401, 801, 901, and 1005 pertaining to definitions and incorporation by reference of current federal regulations and other materials into air quality rules.

Presiding Officer Tom Bowe reported there was very little comment aside from the Department's comments with House Bill 521 and 311 reviews. He further stated this was in the nature of housekeeping, being very routine and uncontroversial.

Dr. Smith MOVED to amend ARM 17.8.101, 102, 302, 401, 801, and 901, and to adopt the hearing officer's comments and the Department's 521 and 311 analysis. Mr. Hudson SECONDED the motion. The motion CARRIED unanimously.

III.B. Briefing to the Board on Status of Initiation of Rules for Water Quality Numeric Standards for EC and SAR

Chairman Russell reminded all present that this item would be a 'brief briefing'.

Art Compton, representing the Department, briefly explained there were several technical issues unresolved and therefore the request to initiate rulemaking will be presented to the Board at its July meeting, instead of today as was previously expected after the March meeting.

Lengthy discussion commenced regarding the Memorandum of Cooperation between Montana and Wyoming, and other issues regarding the water quality and quantity coming into Montana from Wyoming. There was discussion pertaining to Wyoming's compliance with the existing interstate compact for the Tongue and Powder Rivers. Questions were raised as to whether or not any substantial changes or exchanges had taken place between the Department and EPA.

Chairman Russell inquired as to how far away the Department was to establishing a rule for the Board to look at, and why. Mr. Compton reiterated that there were some technical issues in need of resolution before making a recommendation, and provided detailed information regarding those technical issues. He also restated that the Department intends to ask the Board to initiate rulemaking at its July meeting.

A brief discussion was held regarding the involvement of the irrigators in the process. Further discussion was held regarding the EIS, Wyoming's involvement, the TMDL process, and House Bill 521.

Chairman Russell suggested that the Department draft a letter for the Board to send to the Governor to compel cooperation between Montana and Wyoming. Ms. Brooke MOVED to have the letter drafted and shared via email prior to being signed. Ms. Lacey SECONDED the motion. The motion CARRIED unanimously.

Discussion resumed regarding the rulemaking issue and Chairman Russell asked the Board if they would like to look at multiple options and suggested two: 1) numeric standards in a synoptic event, and 2) a TMDL process. Discussion commenced regarding the rule hearings. It was suggested to hold one hearing in Miles City and a second in Helena; Chairman Russell concurred. Dr. Smith suggested it would be good for the Board to actually take a look at some of the sites.

IV.B.3. In the matter of adoption of new Rules I through XVII and repeal of ARM Title 17, Chapter 8, Subchapter 7, pertaining to the issuance of Montana air quality permits.

Presiding Officer Mr. Bowe reported there were lots of comments about the proposed rules and, in fact, extensive comments from the United States Environmental Protection Agency (EPA).

Mr. Homer, representing the Department, addressed the preconstruction issue whether construction should be allowed prior to issuance of a permit. He also addressed portions of the EPA comments and non-specific industry comments, and whether any of those comments were incorporated into the proposal. A brief dialogue launched regarding the way EPA submits comments to the Department.

Dr. Smith MOVED to REPEAL the existing rules, ADOPT the proposed rules, and ACCEPT the hearings officer's report on the status of 521 and 311. Mr. Hudson SECONDED the motion.

Charles Hansberry, representing several industry entities, testified in support of the proposed rules, but requested addition of the pre-permit construction rule. Mr. Hansberry offered reasoning for the additional rule, stating it only allows very limited pre-permit construction, considered seasonally specific. He further stated that Montana has a very short construction season.

Anne Hedges, representing the Montana Environmental Information Center (MEIC), commended the Department on the work put forth. She spoke in favor of considering a few of EPA's comments in regard to clarity in the proposed rules, and provided specific comments toward that end.

Martin Perga, representing Cenex Refinery in Laurel, commended the process and the hard work put into it by Department staff. He stated that the purpose of the rule was to have a rule that the public could understand. He also discussed consent decrees and variances.

Mr. Perga gave lengthy testimony on the risks industry takes already, implying that industry risk with the pre-permit construction rule was a minimal added risk. He concluded by requesting that the Board adopt the pre-permit construction language that allows industry to proceed with construction at their own risk.

Don Allen, representing WETA, provided brief testimony in support of the preamble, asking the Board to consider it.

Mr. Homer briefly explained the Department's reason for not including the preamble and offered specific examples of problems that could result from having the preamble.

Lengthy discussion commenced regarding adding the pre-permit construction language when the rule was not noticed with that language. Mr. Bowe commented that doing so has been viewed as exceeding the scope of rulemaking in previous cases.

Mr. Shanahan made a substitute motion and MOVED to REPUBLISH the notice to allow consideration of comments made by MEIC and the committee that worked on the proposal to the preamble, the pre-permit construction and the bad actor provision. Dr. Smith SECONDED the motion. A vote was taken and the motion CARRIED unanimously.

4. Yellowstone County Air Pollution Control Program

Mr. Bowe introduced the item as a public hearing on proposed amendments to this program.

Russell Boschee provided testimony in support of the proposed amendments, on behalf of Yellowstone County Air Pollution Control Agency. He offered a brief history of the program and a short overview of the proposed amendments. Mr. Boschee explained that repeal of the Emergency Episode Plan was in response to previous EPA comments. He referenced 75-2-301(5), MCA, which supports the EPA comments. Mr. Boschee concluded by requesting that the Board adopt the proposed amendments and repeal the Emergency Episode Plan.

Dr. Smith inquired as to the board's make-up, members, authority and appointments, which led to lengthy discussion on the matter. Mr. Boschee could not produce a member roster or by-laws, but explained he had the original agreement that was signed in 1969 at his office and could provide it to the Board if they desired.

Mr. Homer testified that the Department supports adoption of the Program.

Mr. Shanahan MOVED to APPROVE the proposed amendments with the suggestion that there be an insertion, at some appropriate point, at the beginning of the amendments that states the basic legal authority for creation of the board. Ms. Lacey SECONDED the motion. A vote was taken and the motion CARRIED unanimously.

C. Initiation of Three-Year Review of Temporary Water Quality Standards Adopted for the New World Mining District

Mr. Chisholm explained that the decision before the Board was to set a time and place for this hearing.

John Koerth, representing the Department, provided a brief background on the temporary standards adopted by the Board. He reminded the Board they had received copies of a progress report. Discussion was held regarding a station just below the Glengarry Adit, which did not show improvement in the water quality. This led to conversation on whether the B-1 Standards would be met when the project concluded.

Board members reported difficulty in reading the data in the graphs of the report. Suggestions made included having less data on the graphs or providing separate seasonal graphs.

Mr. Chisholm reminded the Board that the decision before them was to decide how they want to have this hearing. He suggested, on behalf of the Department, that an hour be set aside at the next meeting. He also stated that, at that hearing, the Board could decide to rescind, modify, or stay the current standards.

Mr. Shanahan MOVED to NOTICE it for public hearing at the July meeting. Dr. Smith SECONDED the motion. A vote was taken and the motion CARRIED unanimously.

The Board also confirmed its concurrence with Mr. Hudson's desire to keep being provided the annual updates.

D. New Contested Case Appeals

1. Continental Energy Services, Inc., BER 2002-02 AQ

Mr. Bowe reported that the petitioner filed a Motion to Withdraw Petition, which is not objected to by Continental or the Department. He further informed the Board that there's a proposed order dismissing the contested case for approval by the Board.

Mr. Shanahan MOVED to Grant MEICs motion to withdraw the petition. Dr. Smith SECONDED the motion.

Mr. Hudson held discussion pertaining to decisions being appealed and then, after the hearing dates are set and the process begins, the parties resolve their grievances. He questioned the reasoning behind it.

Ms. Hedges argued in defense, stating the timeframes are very short. She further argued that once you appeal you have more time to review and to work things out.

Chairman Russell reminded the Board that it has been moved and seconded to accept the motion. A vote was taken and the motion CARRIED unanimously.

2. M & W Investments, Inc.

Mr. Bowe provided a brief update, stating he had issued a proposed decision that the appeal be dismissed. He further stated that the parties have time to file exceptions and that he expects this to be on the July agenda.

3. Wendy R. Schulz, BER 2002-03 SUB

Mr. Bowe informed the Board he had received a letter on May 28 from Ms. Schulz requesting to withdraw the contested case, but on the condition that it can be brought back up in the future. He testified that he believed Ms. Schulz and the Department planned to work out a Stipulation of Dismissal to present to the Board at the July 26 meeting.

Mr. Shanahan MOVED to ACCEPT Mr. Bowe's recommendations in both the M & W and the Schulz cases. Ms. Brooke SECONDED the motion. A vote was taken and the motion CARRIED unanimously.

4. Westmoreland Resources, Inc., BER 2002-04 MSUMRA

Mr. Bowe informed the Board that the parties in this case have agreed to a proposed schedule and that a hearing had been set. He also implied he should be the hearing examiner in the case.

Ms. Brooke MOVED to APPOINT Mr. Bowe as the permanent hearing examiner. Mr. Shanahan SECONDED the motion. A vote was taken and the motion CARRIED unanimously.

5. Vicky A. Randolph, BER 2002-05 SUB

Mr. Bowe explained to the Board that this case pertains to an administrative compliance order. He further stated the parties have agreed to a scheduling order and that the hearing is set for August 28.

Mr. Hudson MOVED to appoint Mr. Bowe as permanent hearing examiner in the case. Ms. Brooke SECONDED the motion. A vote was taken and the motion CARRIED unanimously.

6. Missoula County, BER 2002-06 OC

Mr. Bowe stated he had no updates in the case and reiterated his written recommendation to have Kelly O'Sullivan appointed as hearing examiner.

Mr. Shanahan MOVED to appoint Ms. O'Sullivan as hearing examiner. Ms. Brooke SECONDED the motion. A vote was taken and the motion CARRIED unanimously.

E. Proposal of Board Member Ward Shanahan for the Board to Adopt Guidelines for Air Quality Permit Appeals

Mr. Shanahan gave background information on this proposal, stating it had been before the Board previously, but that he had reworded it since then. He stated he had heard only one objection, which concerned the 15-day requirement, and said he would like to hear comments from whoever wished to speak. Mr. North confirmed that the 15-day requirement was in statute.

Mr. Shanahan MOVED to ADOPT the guidelines. Ms. Brooke SECONDED the motion.

Mr. Hansberry spoke in support of adoption of some guidelines and cited the primary need for guidelines was frustration with the lack of clarity on the appeal process. He gave brief testimony as to the problems with the current way things are being done. Mr. Hansberry concluded by requesting that the guidelines be adopted.

Ms. Hedges implied that this document was walking the line toward rulemaking. She stated the 128-day benchmark was unrealistic, and cited the LP case as an example. Ms. Hedges recommended defining an affidavit and deleting the disclosure statement requirement, since the affidavit should contain most of the information being required in the disclosure statement. She stated she believed the guidelines before the Board would tie the Board's hands a little more than it should. Ms. Hedges further stated she thought this should go through rulemaking and that she felt it was unnecessary.

A lengthy discussion commenced regarding specific details that might be changed to address comments. Mr. Bowe offered an example of how he addressed a question regarding this very issue. The Board appeared to be in consensus, agreeing with the guidance Mr. Bowe offered to the questioning party. He then explained the only difference in his guidance and the guidelines before the Board pertained to the way intervention is handled and gave a brief description of the specifics. Mr. Bowe suggested the guidelines be posted to the Board Website in a "Frequently Asked Questions and Answers" (FAQs) format.

Mr. Shanahan renewed his motion, and MOVED to ADOPT the guidelines with two changes noted. Ms. Lacey SECONDED the motion.

Board members engaged in debate over the proposed guidelines and the purpose of them.



Mr. Shanahan made a substitute motion and MOVED to ADOPT the guidelines and incorporate amendments. Ms. Brooke SECONDED the motion.

Board members engaged in further discussion. A vote was taken by roll. Mr. Fishbaugh opposed the motion. Ms. Lacey opposed the motion. Mr. Shanahan was in favor of the motion. Ms. Brooke was in favor of the motion. Mr. Hudson opposed the motion. Dr. Smith opposed the motion.

Ms. Brooke MOVED to develop a guidance document. Dr. Smith SECONDED the motion. The call for a vote was interrupted with discussion on Mr. Bowe not being involved in the process earlier. The vote was not concluded.

F. Final Action on Appeals

1. Conoco, Inc.

Mr. Bowe, on behalf of Ms. Sullivan, explained that the action for the Board is to approve the settlement stipulation and the order dismissing the contested case.

Ms. Brooke MOVED to ACCEPT the order and stipulation and DIRECT the Chair to sign the document. Mr. Fishbaugh SECONDED the motion. A vote was taken and the motion CARRIED unanimously.

2. Blaine County

Mr. Bowe, on behalf of Ms. O'Sullivan, stated the settlement agreement included an agreement to pay the civil penalty that was specified in the settlement agreement and in the order.

Mr. Fishbaugh MOVED to ACCEPT the order and administrative penalties and to DIRECT the Chair to sign the order. Ms. Brooke SECONDED the motion. A vote was taken and the motion CARRIED unanimously.

The agenda concluded.

Prior to adjourning, Chairman Russell announced Mr. Chisholm's upcoming retirement and presented him with a gift from the Board and the Department. Mr. Chisholm responded with a brief speech.

Ms. Lacey MOVED to ADJOURN. Ms. Brooke SECONDED the motion. The meeting adjourned at 1:45 p.m.

Board of Environmental Review June 7, 2002, Minutes Approved:

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JAN P. SENSIBAUGH  
DIRECTOR  
DEPARTMENT OF ENVIRONMENTAL  
QUALITY

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JOSEPH W. RUSSELL, M.P.H.  
CHAIRMAN  
BOARD OF ENVIRONMENTAL  
REVIEW

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DATE

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DATE